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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON D.C. 20548

In reply refer to:
B-184610

July 17, 1981

The Honorable Henry M. Jackson
United States Senate

Dear Senator Jackson:

Further reference is made to your letter of June 11, 1981, with enclosures, asking us to provide you an opinion whether Mr. Henry Bock is eligible for retired pay for non-regular service under chapter 67 of title 10, United States Code (§§ 1331-1337), based on his service in the Navy Reserve. Mr. Bock and other similarly situated persons were denied eligibility for military retirement pay by the Court of Claims decision of May 9, 1980, Ct. Cl. No. 364-79C, for failure to meet the active duty requirement set forth in 10 U.S.C. § 1331(c). In essence section 1331(c) provides that no person who was a Reserve member before August 16, 1945, is eligible for retired pay under those provisions unless he performed active duty during World War I, World War II, or the Korean Conflict.

In your letter you note that Mr. Bock applied for active duty service three times during World War II but was denied active duty status because he had a critical skills job in a defense industry. You have requested an opinion whether his application for active duty was sufficient to meet the aforementioned requirement and thereby entitle him to retired pay.

While we have not rendered a decision directly on Mr. Bock's claim for retired pay, we held in 51 Comp. Gen. 91 (1971) that a Reserve member's receipt of written notification that he is eligible to retire under chapter 67 would not entitle him to retired pay if he has not met the active duty requirement of 10 U.S.C. § 1331(c). The decision appears applicable to Mr. Bock regarding the notice he apparently received.

As to the issue of whether Mr. Bock's unsuccessful attempts to serve on active duty during World War II would

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overcome the active duty requirement of section 1331(c), our 1971 decision did not treat that issue. However, in the petition filed by petitioners (including Mr. Bock) in the Court of Claims, relief was sought under several alleged causes of action. The Petitioners' third cause of action (at page 4 of the petition, copy enclosed) elucidated the facts relevant to their employment in critical industries during World War II and sought to have the active duty requirement of section 1331(c) declared "void and unenforceable" because of impossibility of performance. While the opinion issued by the court did not directly address this particular argument, it is clear that the issue was presented to the court. Court litigation constitutes a full and final resolution of the issues including the Government's liability to the claimants; the doctrine of res judicata precludes us from considering a case involving the same parties and issues as were before the court. 47 Comp. Gen. 573 (1968).

Moreover, 28 U.S.C. § 2519 (1976) provides:

"A final judgment of the Court of Claims against any plaintiff shall forever bar any further claim, suit, or demand against the United States arising out of the matters involved in the case or controversy."

As a result, we are without authority to consider the claim which Mr. Bock has had adjudicated by the Court of Claims.

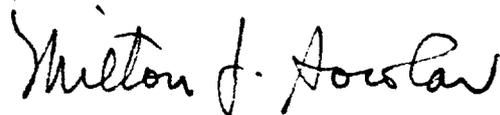
Parenthetically, we call your attention to the Court of Claims opinion where it was held that petitioners' suit was barred by the Supreme Court's decision in Alexander v. Fioto, 430 U.S. 634 (1977), copy enclosed. In that case the court upheld the validity of the section 1331(c) exclusion as an exercise of Congress' constitutional authority. The court noted, at 430 U.S. 365 (footnote 3), that for the purpose of that appeal it was assuming that the failure to serve on active duty was involuntary. Thus, that decision is equally applicable to those who involuntarily failed to serve on active duty as it is to those who evaded such duty.

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In view of the above, we know of no basis upon which Mr. Bock could be awarded retired pay under 10 U.S.C. chapter 67.

We hope this information is responsive to your inquiry and we regret that it could not be more favorable to your constituent.

Sincerely yours,

A handwritten signature in cursive script that reads "Milton J. Fowler".

Acting Comptroller General
of the United States

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Prior court litigation constitutes a full and final resolution of the issues; the doctrine of res judicata precludes this Office from considering a case involving the same parties and issues as were before the Court of Claims even though the court's decision did not directly address a particular argument raised by the claimant.

The Supreme Court's decision in Alexander v. Fioto upheld the constitutionality of 10 U.S.C. § 1331(c) which provides that no person who was a Reserve member before August 16, 1945, is eligible for retired pay under 10 U.S.C. chapter 67 unless he served on active duty during World War I, World War II, or the Korean Conflict. That decision is equally applicable to those who involuntarily failed to perform active duty as it is to those who evaded such duty. Therefore, if a Reserve member did not serve on active duty during one of those periods, even though he volunteered for active duty during World War II, he is not entitled to retired pay under 10 U.S.C. chapter 67.